IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. **78-1848**

~~UNITED STATES OF AMERICA, EX REL~~ JULIUS PETROFSKY,
AND JULIUS PETROFSKY IN HIS OWN BEHALF,

Petitioners,

v.

VAN COTT, BAGLEY, CORNWALL & McCARTHY, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Julius Petrofsky, pro se
for Petitioners
4049 Balboa Street
San Francisco, California
94121

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Your petitioners, the United States of America ex rel. Julius Petrofsky and Julius Petrofsky in his own behalf, respectfully petitions that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered in Case No. 1576 on December 21, 1977, rehearing denied on January 24, 1978, which dismissed the lawsuit as untimely filed on the allegation that the UNITED STATES isn't a (real) party in interest.

OPINIONS BELOW

The Opinions and Orders of the United States District Court, Central Division, of and for the District of Utah, filed March 8, 1977 are unreported. Petitioner's Complaint was dismissed based on the defendants' (respondents' herein) "MOTION TO DISMISS" on the ground "that the Complaint fails to state a claim upon which relief can be granted".

The unreported Court of Appeals Opinion (Appendix 1) was against the Appellants (Petitioners herein). It was claimed to have been based on Federal Rules of Appellate Procedure, Rule 4(a), that the appeal was untimely filed. That Opinion affirmed Appellees' (Respondents' herein) argument (which wasn't presented to the U.S. District Court.) that the UNITED STATES wasn't a party but merely an observer.

JURISDICTION

The Per Curiam Opinion by two judges to one was docketed on December 21, 1978. The Rehearing docketed on January 24, 1979 was denied by the panel.

Jurisdiction is conferred on this Court by the United States Code Title 28, §1254(1).

QUESTIONS PRESENTED

1. Does the principle followed by the Supreme Court of the United States and other Courts of Appeal that the United States of America is a real party in interest in *ex relator* lawsuits prescribed by Title 31 U.S. Code §231, *et seq*, the False Claims Act, apply to this action?

2. Was the Court of Appeals two-judge majority Opinion clearly erroneous that the United States wasn't a (real) party in interest; therefore, asserting that the appeal was untimely filed according to Federal Rules of Appellate Procedure, Rule 4(a)?

3. Did the Opinion violate due process?

STATUTES INVOLVED

The relevant portions of the False Claims Act, United States Code Title 31, §§231-235, in the Complaint are §§231 and 232 (Appendix 2).

STATEMENT OF THE CASE

Under jurisdiction of the False Claims Act §232(B):

> Except as hereinafter provided, such suit may be brought and carried on by any person, as well as for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent; (Appendix 2)

and a portion of §232(C):

> If the United States within said period (60) days shall enter an appearance in such suit the same shall be carried on solely by the United States; (Appendix 2)

petitions brought suit against repondents herein per §232(B) in the United States Court of and for the District of Utah.

The ex relator informer as petitioner sought recovery for the UNITED STATES of AMERICA as well as for himself. The case was assigned to Judge Ritter. The same petitioner as herein then filed with the United States Court of Appeals for the Tenth Circuit a Petition for a Writ in the Nature of a Mandamus to disqualify Judge Ritter. Despite the fact that Petrofsky was suing Willis Ritter in the State of Utah District Court and had filed a previous petition for a Writ in the Nature of a Mandamus in order to stop Ritter's prevention of Petrofsky's inspection of *public* court records, the Writ was denied.

The appellees (respondents herein) filed a Motion To Dismiss on the ground that the Complaint failed to state a cause upon which relief can be granted. Judge Ritter didn't act on the motion[1] during the year (approximately) between the filing of the defendants' Motion To Dismiss and his death. Only a few days after his death, Judge Winner became the presiding judge. Thereupon, on March 9, 1977, he granted the Motion To Dismiss, so the lawsuit wasn't heard on its merits.

The evidences supportive for the Complaint are, for brevity, omitted from this petition. Their relevance will be established when this Court remands the lawsuit on the basis that the UNITED STATES is a real party in interest so that the appeal was timely filed.

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[1] Judge Ritter, by acting not on the Motion to Dismiss, prevented due process for the petitioners.

In the Circuit Court's 21st day of December, 1978 Slip Opinion for its judgment in (Civil) No. 78-1576 (Appendix 1, pp. 4-5) by which it dismissed the Petitioners', UNITED STATES of AMERICA ex relator JULIUS PETROFSKY, lawsuit as untimely, is that the Court introduced sua sponte *"In re* O'Bryan", 399 F. 2nd 916 (10th Cir. 1968) and Maryland Cas. Co. v. Conner, 382 F. 2nd 13 (10th Cir.,1967) then discounted their materiality. Its other cited case is United States v. Baker-Lockwood Mfg. Co. 138 F. 2nd 48 (8th Cir. 1943), infra, it decided diametrically opposite Circuit Judge Riddick's case law therein.

Federal Rules of Appellate Procedure:

Rule 4. Appeal as of Right—When Taken

(a) **Appeals in Civil Cases.** In a civil case...in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from, but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry...

applies to petitioners appeal having been filed more than 30 days and less than 60 days on the basis that the UNITED STATES was a real party in interest from the commencement of the action according to Federal Rules of Civil Procedure

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) **Real Party in Interest.** Every action shall be prosecuted in the name of the real party in interest...[A]nd when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of real party in interest; and such ratification, joinder, or substitution shall

have the same effect as if the action had been commenced in the name of the real party in interest.

The United States Code Title 31

§231. Liability of persons making false claims

Any person...who shall...present...for payment or approval,...any claim upon or against the Government of the United States, or any department or officer therof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim,...shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing suich act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

established that the United States is the real party in interest in actions by it for false claims made on it (Appendix 2). The United States Supreme Court referred to §231 in Opinion of the Court and in the case law as the False Claims Act; **Rainwater v. United States,** 356 US 590, 2L Ed 2nd 996,998, 78 S Ct 946; and **United States v. Bornstein,** 423 US 303, 46 L Ed 2nd 514,519, 96 S Ct 523.

§232. Same; suits; procedure

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such

> person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent.

by its introduction, "Same;" establishes that the United States is the real party in interest because it is part and parcel of the False Claims Act as is § 231, for which there isn't question that the United States is the real party in interest. U.S. Justice Black's "Opinion of the Court" in **United States ex relator Marcus v. Hess,** 317 U.S. 538,540 87L Ed 443,447, 63 SC 379,382 recognized that § § 231 and 232 are of one act by:

> The petitioner, in the name of the United States and on his own behalf brought this action under § 5438 and § § 3490-3493 (31 USCA § § 231-234) of the Revised Statutes.

It is supported by the case law therein. Justice Black also provided a similar Opinion in **United States v. New Orleans Chapter, A.G.C. of A. on the relation of Samuel Ostrager,** 317 U.S. 562, 87 L.Ed. 459, 63 S Ct 393; an action substantially the same as the Marcus case, supra.

Although the United States hadn't intervened in the first two Marcus cases in the U.S. District Court, 41 F. Supp. 197 and 43 F. Supp. 12, this Court "REQUESTED" the (U.S.) Solicitor General to file a brief amicus curiae when Marcus' Petition for a Writ of Certiorari was filed for this Court's October Term, 1942. On Oct. 12, 1942 the Petition...was granted and the United States' brief amicus curiae was filed on 8 Dec. 1942. This Court by its "Request" for the United States to file a brief amicus curiae gave de facto, if not de jure, recognition of the United Status as a real party in interest in actions such as this.

United States v. Ward Baking Co., 376 U.S. 327, 11 L.Ed. 2d 743, 84 S Ct 763 (1964), 765, footnote 2 of Justice Goldberg's Opinion of the Court is:

> The companies were also charged with violation the False Claims Act, Revised Statues § § 3490, 3491, 3492, 5438, as amended, 31 U.S.C. § § 231-233, derived from Act of March 2, 1863. This was settled....

Please note that the United States was a party in interest even though there wasn't an ex relator. This action by an ex relator (Petrofsky) doesn't make the United States less a party in interest even though the United States declined to appear; it didn't "withdraw"[2]. It is for the reason of § 232(C):

> PROVIDED, That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearence therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section.

That clause also has:

> In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit.

Therefore, as long as in the final analysis the United States has control of the proceeding, or can appeal from the judgment it is a party in interest as decided in **Burrell et al. v. United States,** 147 F. 44,46 by Judge Ross:

> The terms 'parties' include all persons who are directly interested in the subject-matter, who have right to...appeal from the judgment.

In fact in **United States ex rel. Thompson v. Hays,** 432 F. Supp 253 (1976), 255 the United States was permitted to enter a "special appearance" in an action under the False Claims Act, 31 U.S.C. § § 231-232.

This Court of Appeals for the Tenth Circuit in **Boeing Airplane Company v. Perry,** 322 F. 2d 589,591 (1963) case law [1,2] by Murrah, Chief Judge, held:

> And, the 'real party in interest' is the one, who under applicable substantive law, has the legal right to bring the suit.

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[2] See Appendix 1, p. 5

The False Claims Act clearly provides not only that the United States has the legal right to bring the suit but it goes so far under § 232(C)(2) as to determine an ex relator's share of the recovery FOR THE UNITED STATES by:

> In any such suit not carried on by the United States as herein provided,... the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B).[3]

In **Curtner Et Al. v. United States**, 149 U.S. 890,893, is

> But we are of the opinion that since the right of the government of the United States to institute such suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud, or deceit, or any of those practices which are admitted to justify a court in granting relief, the government must show that like a private individual, it has such an interest in the relief sought as entitles it to move in the matter.

This petition's action involved the conditions set forth immediately above except that it is by an ex relator for the United States per Title 31, § § 231 and 232.

That government as a real party in interest is also discussed by Judge Sanborn in **United States v. DeQueen & Eastern R.R. Co.**, 271 F. 2nd 597,599, case law [1]

> Reduced to its simplest times the situation as we see it, is that the defendent has in its possession unearned Government funds which were paid to it by mistake, and which it has no legal right to retain....

This action is of far great public interest even though the Government for reason of its own merely declined to appear in a matter of fraud, not just mistake, as above.

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1 Appendix 2.

2 It involves a corrupt U.S. Chief Judge which was a thorn in the side of the U.S. Department of Justice's Criminal Division.

In **United States v. Baker-Lockwood Mfg. Co., Inc. et al**, infra, Appendix 1, Judge Riddick, p. 51, case law [1,2]

> THE UNITED STATES IS NOT ONLY A PARTY ON THE RECORD IN THE NATHANSON SUIT, IT IS A REAL PARTY IN INTEREST, AND, AS SUCH, WE THINK IT HAS A RIGHT TO APPEAR AND BE HEARD IN THE PROTECTION OF ITS INTERESTS. (emphasis ours)

This Court's mandate No. 560, Feb. 7, 1944, 321 U.S., 744 & 746, 88 L.Ed. 1048 & 1049, occasioned the appearance of the United States in the Baker-Lockwood case per relevant docket entries of Appendix 3.

The affirmative answer to the questions is best answered by Judge Logan's dissent (Appendix 1, p. 6):

> LOGAN, Circuit Judge, dissenting:
>
> With respect, I must dissent in this case. I agree with the reasoning of Judge Friendly quoted in the majority opinion. The harm in applying a 30-day requirement is that an appeal is denied because an attorney (or here a pro se litigant) read the statute literally, without recognizing the distinctions courts have drawn between cases where the government is considered to be a real party in interest and those where it is a nominal party. The only social cost in applying a permissive or liberal reading of the statute is that parties in these actions have 30 extra days to prepare on appeal, and an appellate court will have to treat on its merits a case which it could otherwise dismiss. I am not anxious to add to our caseload, but believe that the narrow reading "introduces an element of uncertainty in the very critical, because regarded as jurisdictional, area of the time for appeal, and

it ought not find favor." 9 Moore's Federal Practice ¶ 204.10, at 924 (2d ed. 7). I would choose a broad reading of Fed.R.App.P. 4(a), making the 60-day period applicable.

IMPORTANCE OF THE QUESTIONS

The question here is whether the plain language of the statute is to be judicially limited and in large part nullified by a Rule technicality. No other legislation confers the right to recover penalties and double damanges for frauds in connection with claims against the United States. The pressing need for such a remedy for this specific evil has been recently recognized in this Court. See *United States v. Cooper Corp.*, 312 U.S. 600,614. Judicial recognition of the plain intent of Congress and the preservation of the remedies and safeguards created by it require that the decision of the court below be brought here for review.

Where it is respectfully submitted that this petition for certiorari should be granted and that a mandate for remand is issued as in the Baker-Lockwood case, supra.

May 21, 1979

Julius Petrofsky, pro se
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San Francisco, Cal. 94121

APPENDIX 1.

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATE of America

UNITED STATES of America
ex relator JULIUS PETROFSKY,

Plaintiffs-Appellants,

v.

VAN COTT, BAGLEY, CORNWALL,
McCARTHY, a Utah law firm
which is also a Utah corporation,
and Utah attorneys: C. KEITH
ROOKER, CLIFFORD ASHTON,
ROBERT M. ANDERSON, GRANT
H. BAGLEY, DENNIS McCARTHY,
RAY G. MARTINEAU, RICHARD
W. GIAUQUE, BRENT GIAUQUE,
RICARDO B. FERRARI, HALDOR
T. BENSON, SCOTT E. SAVAGE,
DALE A. KIMBALL, GRANT
MACFARLANE, JR., CHRIS
WANGSGARD, and
DAVID GREENWOOD,
and JOHN DOE #1 through
JOHN DOE #10,

Defendants-Appellees

No. 78-1576

Appeal From the United States District Court
For The Central District of Utah
C-77-0045

Appellant Julius Petrofsky filed a pro se memorandum in support of jurisdiction.

Dee V. Benson of Snow, Christensen & Martineau, Salt Lake City, Utah, filed a memorandum in support of dismissal.

Before McWILLIAMS, BARRETT and LOGAN, Circuit Judges.

PER CURIAM.

Appellant Julius Petrofsky brought a pro se action against a Salt Lake City law firm under the False Claims Act, 31 U.S.C. § 231. Private individuals may sue under this Act in the name of the United States to uncover fraudulent claims made against the United States. 31 U.S.C. § 232(B). The statute requires the government join or withdraw from the suit within 60 days. If the United States joins, it controls the litigation; if it withdraws, the person bringing the action may proceed individually. 31 U.S.A. § 232(C). The United States specifically declined to enter Petrofsky's suit and the action was dismissed by the United States District Court for the Central District of Utah for failure to state a claim upon which relief may be granted. Exactly 60 days later Petrofsky appealed that dismissal to this Court.

The issue is whether, under Rule 4(a) of the Federal Rules of Appellate Procedure, "the United States or an officer or agency thereof is a party" to this action, thereby extending to 60 days the 30-day time limit for filing appeals.

More time to appeal is needed when the United States is a party because the government must process its decision through internal channels before a decision is made. Fairness dictates that opposing non-governmental parties be given the same time. 9 Moore's Federal Practice ¶ 204.10, at 924 (2d ed. 7).

This circuit has an established rule interpreting private actions under the Miller Act, 40 U.S.C. § 270 *et seq.*, in the name of the United States as including the

government as a real party in interest. United States v. Douglas Constr. Co., Inc., 531 F. 2d 478 (10th Cir. 1976); Barnard-Curtiss Co. v. United States, 252 F. 2d 94 (10th Cir. 1958). The rationale for these cases is stated in United States Fidelity & Guar. Co. v. United States, 204 U.S. 349,356 (1907):

> The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies with certainty and promptly. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the government would exert its power directly for their protection.

Other cases have given Fed.R.App.P. 4(a) a broad reading because the rule is stated in absolute terms as to any action involving the United States. Division of Labor Law Enforcement v. Stanley Restaurants, 228 F.2d 420 (9th Cir. 1955). In United States v. American Society of Composers, Authors and Publishers, 331 F.2d 117,119 (2d Cir.) *cert. denied*, 377 U.S. 997 (1964), Judge Friendly stated the rationale for a broad reading under the predecessor rule, as follows:

> It is in the last degree undesirable to read into a procedural statute or rule, fixing the time within which action may be taken, a hidden exception or qualification that will result in the rights of clients being sacrificed when capable counsel have reasonably relied on the language. Section 2107 of Title 28 and F.R.Civ.Proc. 73(a) unequivocally allow "to all parties" 60 days to appeal in any action "in which the United States or an officer or agency thereof is a party." The stated criterion is whether the United States is a party to the action, a test clearly satisfied here, and not whether the United States is concerned with the particular order sought to be appealed—something that often cannot be accurately determined with the order is made.

Courts have not hesitated to apply the 30-day rule, however, when the United States' interest is tangential or nominal. Consequently, this Court dismissed an appeal under Fed.R.App.P. 4(a) when the appellant claimed the United States was a party only because a federal district judge enforced his disbarment. *In re* O'Bryan, 399 F.2d 916 (10th Cir. 1968). We also held to the same effect when the only United States involvement was plaintiff's assertion of a lien against a United States corporation that was dismissed from the suit. Maryland Cas. Co. v. Conner, 382 F.2d 13 (10th Cir. 1967).

Petrofsky based his claim in the lower court on the False Claims Act. That statute was enacted during the Civil War to encourage citizens to personally prosecute instances of fraud perpetrated against the United States. It has received little attention in modern history. Unlike our cases under the Miller Act, there is no clear precedent to support a continuing governmental interest in these suits after the United States has opted out. In fact, a case decided by the Eighth Circuit clearly distinguishes the government's interest and that of the private litigant, and states the government's interest cannot be affected by the plaintiff;s actions. United States v. Baker-Lockwood Mfg. Co., 138 F.2d 48 (8th Cir. 1943).

The statute gives the government the option to prosecute the case itself, or withdraw. Here the government withdrew. Petrofsky knew this, and so did the defendant. It was clear at that time the United States would not participate in the suit and that proceeding in its name was merely a statutory formality. While this Court recognizes the need for an open interpretation of Fed.R.App.P. 4(a) to assure innocent parties not be prejudiced by too strict a reading, the rule achieves no such purpose in this case. All parties were aware the government disclaimed any participation in the suit and there are no other circumstances which indicate a need for more than the usual 30 days to make the appeal. For these reasons, we hold the 60-day provision inapplicable and dismiss the appeal for failure to file within the 30-day requirement of Fed.R.App.P. 4(a).

LOGAN, Circuit Judge, dissenting.

With respect, I must dissent in this case. I agree with the reasoning of Judge Friendly quoted in the majority opinion. The harm in applying a 30-day requirement

is that an appeal is denied because an attorney (or here a pro se litigant) read the statute literally, without recognizing the distinctions courts have drawn between cases where the government is considered to be a real party in interest and those where it is a nominal party. The only social cost in applying a permissive or liberal reading of the statute is that parties in these actions have 30 extra days to prepare on appeal, and an appellate court will have to treat on its merits a case which it could otherwise dismiss. I am not anxious to add to our caseload, but believe that the narrow reading "introduces an element of uncertainty in the very critical, because regarded as jurisdictional, area of the time for appeal, and it ought not find favor." 9 Moore's Federal Practice ¶ 204.10, at 924 (2d ed. 7). I would choose a broad reading of Fed.R.App.P. 4(a), making the 60-day period applicable.

APPENDIX 2.

Title 31, §231: Liability of persons making false claims

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such

money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the recept of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any solder, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

R.S. § § 3490, 5438.

31, §232: Same; suits; procedure

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, or by

certified mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit. *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

(D) In any suit whether or not on appeal pending December 23, 1943, brought under this section, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, or by certified mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C) of this section.

(E)(1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therei, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to

such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or herafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B) of this section, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonalbe expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States.

R.S. §3491; June 25, 1936, c. 804, 49 Stat. 1921; Dec. 23, 1943, c. 377, §1, 57 Stat. 608; June 25, 1948, c. 646, § §1, 32(b), 62 Stat. 909, 991; May 24, 1949, c. 139, §127, 63 Stat. 107; June 11, 1960, Pub.L. 86-507, §1(28),(29), 74 Stat. 202.

APPENDIX 3.

UNITED STATES DISTRICT COURT

Docket 1407

U.S. ex rel Lou Nathanson vs. Baker-Lockwood Mfg. Co.

Continued from page 139

Mar. 23, 1944, Mandate from U.S. Supreme Court filed. (remanding with instructions)

Mar. 27, 1944, Entry of appearance of the United States, and Notice of appearance and demand filed.

Apr. 26, 1944, Plaintiff's Motion to strike, etc. filed; Suggestions in support filed; Request for oral argument filed. Notice of filing motion filed.

May 16, 1944, Brief for the United States in opposition to motion to strike the United States' entry of appearance filed.

May 16, 1944, Motion and Notice of motion; affidavit in support of motion; memorandum in support of motion filed. *(cont. to Page 148)*

May 17, 1944, Affidavit of Irene H. McEntyre filed.

May 22, 1944, Plantiff's motion to strike appearance of United States, and motion to dismiss argued, submitted and taken under advisement.

May 29, 1944, Case passed.

June 23, 1944, Memorandum and order overruling motion to strike appearance of the United States filed. Memorandum and order on motion to dismiss, plantiff allowed 20 days to file counter affidavit.

July 20, 1944, Order dismissing case filed.

June 28, 1945, Motion of Continental Casualty Co. for order approving payment of penalty of bond, etc. filed. Order approving payment and discharging bond filed.

ADDENDUM TO APPENDIX I

(inadvertently omitted by Clerk of the Court for first printing.)

JANUARY TERM - January 24, 1979

Before Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable James K. Logan, Circuit Judges

United States of America ex relator,
JULIUS PETROFSKY,

Plaintiff - Appellant,

vs.

VAN COTT, BAGLEY, CORNWALL, McCARTHY,
a Utah law firm and corporation; and
Utah attorneys: C. KEITH ROOKER,
CLIFFORD ASHTON, ROBERT M. ANDERSON,
GRANT H. BAGLEY, DENNIS McCARTHY,
RAY G. MARTINEAU, RICHARD W. GIAQUE,
RICARD B. FERRARI, HALDOR T. BENSON,
SCOTT E. SAVAGE, DALE A. KIMBALL,
GRANT MACFRALANE, JR., CHRIS WANSGARD,
and DAVID GREENWOOD; and JOHN DOE #1
through JOHN DOE #10,

Defendants - Appellees.

No. 78-1576

this matter comes on for consideration of the petition for rehearing tendered for filing by the appellant on January 17, 1979.

Upon consideration whereof, it is ordered that the petition for rehearing be filed as of January 17, 1979.

It is further ordered that the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

By: Robert L. Hoecker
Chief Deputy Clerk

Julius Petrofsky, pro se
4049 Balboa St.
San Francisco, Cal. 94121

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1848

UNITED STATES OF AMERICA, EX REL. JULIUS PETROFSKY,
AND JULIUS PETROFSKY IN HIS OWN BEHALF,

Petitioners,

v.

VAN COTT, BAGLEY, CORNWALL & McCARTHY, ET AL.

SUPPLEMENTAL APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Julius Petrofsky, pro se
for Petitioners
4049 Balboa Street
San Francisco, California
94121

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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Julius Petrofsky, pro se
for Petitioners
4049 Balboa Street
San Francisco, California
94121

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

THE UNITED STATES OF AMERICA
Ex Relator; JULIUS PETROFSKY,

Plaintiff,

vs.

ORDER AND JUDGMENT
OF DISMISSAL

No. C-77-0045

VAN COTT, BAGLEY, CORNWALL
& McCARTHY, et al.,

Defendants.

Plaintiff's Motion for the Disqualification of Chief Judge Willis W. Ritter and defendants' Motion to Dismiss came on regularly for hearing before the Honorable Fred M. Winner on Tuesday, March 7, 1978, at 1:30 p.m. The plaintiff appeared pro se. The defendants appeared by and through thier counsel of record, Harold G. Christensen, Esq.

The court having given the plaintiff a full opportunity to be heard and the plaintiff having elected to stand on his pleadings and memoranda and the court having taken judicial notice of the death of Chief Judge Willis W. Ritter and it appearing from the file that the United States of America has declined to enter an appearance in this action and the court being fully advised, now, therefor, it is

ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion for the Disqualification of Chief Judge Willis W. Ritter be and the same hereby is moot;
2. Defendants' Motion to Dismiss be and the same hereby is granted; and
3. This action be and the same hereby is dismissed.

Dated this 8th day of March, 1978.

Fred M. Winner
Chief Judge

IN THE

Supreme Court of the United States

No. 78-1848

UNITED STATES, *ex rel.*
JULIUS PETROFSKY,
Petitioner,

vs.

VAN COTT, BAGLEY, CORNWALL & McCARTHY,
et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

SNOW, CHRISTENSEN
& MARTINEAU
Harold G. Christensen
700 Continental Bank Building
Salt Lake City, UT 84101
Attorneys for Respondents

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IN THE

Supreme Court of the United States

No. 78-1848

UNITED STATES, *ex rel.*
JULIUS PETROFSKY,
Petitioner,

vs.

VAN COTT, BAGLEY, CORNWALL & McCARTHY,
et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether Petitioner's appeal to the United States Court of Appeals for the Tenth Circuit, filed 60 days after entry of the District Court's Order, was timely filed.

STATEMENT OF THE CASE

On February 16, 1977, Petitioner Julius Petrofsky, acting *pro se,* filed suit in the United States District Court for the District of Utah against Respondents, seeking damages under the False Claims Act, 31 U.S.C. §232. Respondents are a Salt Lake City, Utah law firm of more than 30 attorneys and named individual members of the firm.

The False Claims Act allows individuals to sue in the name of the United States to recover fraudulent claims made against the United States. Petrofsky's Complaint in the District Court alleged fraud against the United States on the part of Respondents which allegedly occurred at a time when Respondents represented the claim of a plaintiff against the United States in *Murray v. United States,* 327 F.Supp. 835 (D. Ut. 1971). The late Willis W. Ritter, former Chief Judge of the United States District Court for the District of Utah, presided over *Murray.* The plaintiff in *Murray* was successful and awarded damages. The verdict was upheld on appeal. *United States v. Murray,* 463 F.2d 208 (10th Cir. 1972).

According to Petrofsky, Respondents committed fraud by not disclosing to the United States Attorney that they had previously represented American Gypsum Trust of which Judge Ritter had been a trustee in a suit in the district court of Sevier County, Utah. Petrofsky's reasoning, apparently, is that Respondents prevented the United States Attorney from filing a motion to disqualify Judge Ritter in *Murray,* and that if such motion had been made, Judge Ritter would have been disqualified and another judge would have decided the case differently than Judge Ritter or at least awarded lesser damages.

Pursuant to the terms of the False Claims Act, the Government must either join or withdraw from the suit within 60 days after suit is commenced. 31 U.S.C. §232 (c). If the Government joins, it controls the litigation. If it withdraws, the person bringing the action may proceed individually. *Id.*

On April 25, 1977, the United States, by letter, expressly declined to join in Petrofsky's case. Thereafter, Petrofsky proceeded individually.

Respondents moved to dismiss Petrofsky's suit for failure to state a claim upon which relief could be granted. More specifically, Respondents asserted the allegations of the Complaint were insufficient to state a claim for fraud under the Act or any other theory and, furthermore, that Petrofsky's action was frivolous, being designed not to assert a legitimate claim but rather to attempt to use the Federal Courts to harass and frustrate reputable lawyers and a Federal judge.

Respondents' motion was granted and entered by the District Court on March 8, 1978. Sixty days later, on May 8, 1978, Petrofsky appealed the Order of Dismissal to the Tenth Circuit Court of Appeals.

On December 21, 1978, the Circuit Court, on its own motion and after requesting briefs on the issue, dismissed Petrofsky's appeal for failure to timely file. Rule 4 (a) of the Federal Rules of Appellate Procedure requires an appeal to be brought within 30 days unless "the United States or an officer or agency thereof is a party" in which case the time limit is extended to 60 days.

Petrofsky argued to the court below that the time for appeal is 60 days because the case was brought in the name of the United States. The court specifically rejected Petrofsky's argument, and, in doing so, emphasized that the Government had timely and clearly withdrawn from any

participation in Petrofsky's suit and therefore was not a party to the action. Hence, the court found the 30-day requirement of Appellate Rule 4 (a) controlling and held Petrofsky's appeal was not in time. *United States, ex rel. Julius Petrofsky v. Van Cott, Bagley, Cornwall, & McCarthy,* 588 F.2d 1327 (10th Cir. 1978).

ARGUMENT

In his Petition for a Writ of Certiorari, Petrofsky fails to advance any reason why the issue presented in this case should be reviewed by this Court. Petrofsky does not suggest that this case qualifies for review under any of the criteria listed in Rule 19 of the Revised Rules of the Supreme Court of the United States.

Aside from one paragraph at the close of Petrofsky's Petition, wherein he seems to suggest that review should be had because of the "importance" of the issue, Petrofsky's Petition offers no reason whatever why this Court should exercise its discretion to review this case. Rather, the Petition is devoted to arguments why Petrofsky feels the Circuit Court of Appeals should have decided in his favor.

A review of the Circuit Court's opinion shows a holding harmonious with legal precedent and with the purpose, meaning and intent of Rule 4 (a) of the Federal Rules of Appellate Procedure.

A. THERE IS NO SPECIAL OR IMPORTANT REASON WHY THIS COURT SHOULD REVIEW THE LOWER COURT'S DECISION.

Petrofsky's Petition is devoid of grounds to support his request that this Court grant review. The opinion of

the court below is not in conflict with the decisions of another Court of Appeals or of the United States Supreme Court on the same matter. Of the numerous cases cited in Petrofsky's Petition, not one is concerned with the question at issue in this action.

This case does not present an important issue of Federal law which should be settled by this Court. Petrofsky's suit is based on a provision of an Act which, in the words of the Tenth Circuit, "was enacted during the Civil War" and "has received little attention in modern history." 588 F.2d 1329 (10th Cir. 1978). See also *United States, ex rel, Marcus v. Hess,* 317 U.S. 537, 547 (1943), where this Court said:

> [O]ne of the chief purposes of the Act, which was itself first passed in war time, was to stimulate action to protect the government against war frauds.

There being no grounds for granting review, Petrofsky's Petition should be denied.

B. THE COURT BELOW CORRECTLY APPLIED APPELLATE RULE 4 (a). THE UNITED STATES, HAVING EXPRESSLY WITHDRAWN, WAS NOT A PARTY TO THE SUIT.

The Circuit Court's review and analysis of whether the Government was a party to this suit within the meaning and purpose of Rule 4 (a) of the Federal Rules of Appellate Procedure was harmonious with the purpose and intent of the rule itself and the False Claims Act pursuant to which the suit was commenced.

With respect to provisions of the Act requiring the Government to join or withdraw from the suit, the Circuit Court stated the following:

> The statute gives the Government the option to prosecute the case itself, or withdraw. Here the Government withdrew. Petrofsky knew this, and so did the Defendant. It was clear at that time the United States would not participate in the suit and that proceeding in its name *was merely a statutory formality*. 588 F.2d at 1329. (Emphasis added).

In its opinion, the lower court makes clear its awareness of and adherence to the need for a broad and open reading of Appellate Rule 4 (a) "to assure innocent parties [will] not be prejudiced by too strict a reading." *Id.* It was after full recognition of this open reading policy and a rather detailed discussion of prior decisions of its own and other Circuit Courts of Appeal regarding when the United States is and is not considered a party under Rule 4 (a), that the lower court specifically decided in this case the appeal was not timely filed. The court stated:

> All parties were aware the Government disclaimed any participation in the suit and there are no other circumstances which indicate a need for more than the usual 30 days to make the appeal. *Id.*

Petrofsky was given timely and unambiguous notice from the Government that it did not wish to participate in Petrofsky's suit. For almost a full year prior to entry of the District Court's Order of Dismissal, Petrofsky was in sole charge of prosecuting his action. The Government had withdrawn. There existed no continuing governmental participation of any type.

The situation was far different from cases arising under the Miller Act, 40 U.S.C. §270, *et seq.*, where the Government is considered a party under Rule 4 (a) even though the suit is privately brought and prosecuted. In Miller Act cases, the underlying dispute is entirely based on contracts to which the Government is a principal party. Therefore, the Government is considered to have a continuing governmental interest in the suits. *United States Fidelity and Guaranty Co. v. United States,* 204 U.S. 349, 356 (1907); *United States v. Douglas Constr. Co. Inc.*, 531 F.2d 478 (10th Cir. 1976).

As the Circuit Court noted, "[m]ore time to appeal is needed when the United States is a party because the government must process its decisions through internal channels." Under the circumstances of this case, however, the Government was not a party. There was no basis in fact or law for application of Rule 4 (a)'s 60-day time allowance.

CONCLUSION

Petrofsky's appeal was untimely. There is no special or important reason why this Court should grant review. The Petition for Certiorari should be denied.

Respectfully Submitted,

SNOW, CHRISTENSEN
& MARTINEAU

Harold G. Christensen

Attorneys for Respondents

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1848

UNITED STATES OF AMERICA, EX REL JULIUS PETROFSKY, AND JULIUS PETROFSKY IN HIS OWN BEHALF,
Petitioners,

v.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY, ET AL.

On Petition For A Writ Of Certiorari To The United States Circuit Court Of Appeals For The Tenth Circuit

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PETITIONER PETROFSKY'S RESPONSE CONTRA RESPONDENTS BRIEF IN OPPOSITION

JULIUS PETROFSKY
Pro Se for Petitioners
4049 Balboa Street
San Francisco, California 94121

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1848

UNITED STATES OF AMERICA, EX REL JULIUS PETROFSKY, AND JULIUS PETROFSKY IN HIS OWN BEHALF,
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On Petition For A Writ Of Certiorari To The United States Circuit Court Of Appeals For The Tenth Circuit

---

PETITIONER PETROFSKY'S RESPONSE CONTRA RESPONDENTS BRIEF IN OPPOSITION

PETITIONER'S ARGUMENT

Re Respondents' "Statement Of The Case"

A. Page 3, 2nd paragraph is *significantly false!* Respondent's Motion To Dismiss (herein Appendix 1) doesn't have any relationship to,—

> More specifically Respondents' asserted the allegations of the Complaint were insufficient to state a claim for

> fraud under the Act or any other theory and, furthermore, that Petrofsky's action was frivolous, being designed not to assert a legitimate claim but rather to harass and frustrate reputable lawyers and a Federal judge.

NOTE: Appendix 1, supra,—

> Defendants move the dismissal of this action on the ground that the Complaint fails to state a claim upon which relief can be granted.

is not only without supportive argument but even omitted the Federal Rule of Civil Proc. for it. The judge even prevented Respondents' attorney from speaking on the Complaint's issues so they never went to trial as they could have been had Respondents' attorney spoken about even one of them.

B. Respondents' page 3, 4th paragraph,—

> [T]he Circuit Court . . . after requesting briefs on the issue, dismissed Petrofsky's appeal for failure to timely file.

is at its best, a half-truth, if not *false!* Appendix 2 (herein) is the circuit court "request." It is for "memoranda" and limited to the United States as a,—

> party in interest.

The request didn't address itself to the Complaint's issue(s).

C. The Circuit Court decision (Petition . . . Appendix 1) went beyond a "party in interest" to "*real* party in interest." Nevertheless Petitioner Petrofsky argued that the United States is at the least, "a party in interest" if not a "*real* party in interest.

Re Respondents' "Argument"

A. Page 4, 2nd paragraph, last sentence,—

> Rather, the Petition is devoted to arguments why Petrofsky feels the Circuit Court of Appeals should have decided in his favor.

is FALSE! NOTE: Petrofsky didn't argue for decision "in his favor" (nor does Respondents' attorney know of Petrofsky's feeling) but for his and the United States 'day in Court,' i.e., not to having been subjected to a tenuous Rule.

B. Page 5, 3rd line,—

> of the numerous cases cited . . . not one is concerned with the question at issue in this action

is unsupported by Respondents'. And Respondents' following that reference to the Civil War enaction of the Act (amended at a much more recent date) is irrelevant and immaterial.

C. Respondents' B, 2nd sentence,—

> THE UNITED STATES HAVING EXPRESSLY WITHDRAWN

is *FALSE!* The United States didn't do so. (Expressly or otherwise). By way of example,—when a female "declines" sexual activity that is totally different to a male's having "withdrawn" (after sexual penetration).

This Court has judicial knowledge that the U.S. Dept. of Justice lost many lawsuits; therefore that department is *not* infallible. The fact of its having "declined" to appear is not only immaterial and irrelevant but subject to this Court's ex parte inquiry for its having declined to appear. Petitioner Petrofsky has documentation which he would present to one or all the Justices which strongly (if not irrevocably), and includes testimony of former Assistant

U.S. Attorneys, that the subject Department committed non-feasance by its loathing to "take-on" U.S. District Court Chief Judge Willis W. Ritter (Utah), who was directly involved in this lawsuit, to a greater degree than was testified to by the Chief Judge of the U.S. Court of Appeals, Tenth Circuit, in a U.S. Senate Hearing.

CONCLUSION

A. For any of the foregoing reasons, if not for all, the Respondents' Brief in Opposition should be stricken.

B. The Respondents' attorney per page 3, 2nd paragraph, is scurrilous.

Respectfully submitted,

JULIUS PETROFSKY
Pro Se for Petitioners
4049 Balboa Street
San Francisco, California 94121

September 21, 1979

APPENDIX

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MOTION TO DISMISS
Civil No. C-77-0045

THE UNITED STATES OF AMERICA, Ex Relator;
JULIUS PETROFSKY, *Plaintiffs,*

vs.

VAN COTT, BAGLEY, CORNWALL, McCARTHY, a Utah law firm which is also a Utah corporation; and Utah Attorneys: C. KEITH ROOKER, CLIFFORD ASHTON, ROBERT M. ANDERSON, GRANT H. BAGLEY, DENNIS McCARTHY, RAY G. MARTINEAU, RICHARD W. GIAUQUE, BRENT GIAUQUE, RICARDO B. FERRARI, HALDOR T. BENSON, SCOTT E. SAVAGE, DALE A. KIMBALL, GRANT MacFARLANE, JR., CHRIS WANGSGARD, and DAVID GREENWOOD, and JOHN DOE #1 through JOHN DOE #10, *Defendants.*

Defendants move the dismissal of this action on the ground that the Complaint fails to state a claim upon which relief can be granted.

DATED this 8th day of March, 1977.

SNOW, CHRISTENSEN & MARTINEAU

/s/ By HAROLD G. CHRISTENSEN
Harold G. Christensen
Attorneys for Defendants
700 Continental Bank Bldg.
Salt Lake City, Utah 84101

APPENDIX 2

August 17, 1978

Mr. Julius Petrofsky
4049 Balboa Street
San Francisco, California 94121

Re: No. 78-1576, U.S.A., etc., Petrofsky v. VanCott, Bagley, etc., et al

Dear Mr. Petrofsky:

The Court has assigned the captioned case to Calendar D. At this time, the Court is considering summary dismissal for the reason that the appeal may not be within the jurisdiction of the Court. Pursuant to Rule 9 of the Rules of this Court, the parties are requested to submit memoranda addressing the issue of whether the United States was a party in this action and, in conjunction therewith, whether the notice of appeal was timely filed.

The original and three copies of such memoranda, together with proof of service on opposing parties, may be filed in this Court within fifteen (15) days of today's date. Briefs need not be filed until further notice from the Court.

If this office can be of further assistance to you in this matter, please do not hesitate to contact me.

Very truly yours,

HOWARD K. PHILLIPS, Clerk

By

Deputy Clerk

TC/sb

cc: Harold Christensen & Deen Benson, Snow, Christensen & Martineau, 700 Continental Bank Bldg., Salt Lake City, UT 84101